HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

(Chapter VIII Rule 32 (2)(b)

Description of the case.

W.P. No. 478/06 (M/S)
Smt. Rita Sharma and others.
Vs
State of others

Approved for reporting.

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~~Not approved for reporting~~

Date of decision 10.08.2006

Initial of Judge

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

WRIT PETITION NO.478 (MS) OF 2006

1. Smt. Rita Sharma,
   D/o late Shri S.R. Sharma,
   R/o 88/85, Mohalla, Nilkhudana,
   Jwalapur, Haridwar,
   District-Haridwar.
2. Kamal Nayan Semwal,
   S/o Shri Rameshwar Prasad Semwal,
   R/o Village Shirwa, Post Office Parkandi,
   District-Redraprayag.
3. Umesh Chandra Bhatt,
   S/o Shri Krishna Ballabh Bhatt,
   R/I Vilalge Bhatwari, Post Office Bhatwari,
   District-Rudraprayag.
4. Dikshant Kumar,
   S/o Shri Ajit Prasad,
   R/o Village & Post Rohalki Kishanpur,
   Near Bahadarabad,
   District-Haridwar.
5. Gopal Singh Bhandari,
   S/o Shri Darban Singh Bhandari,
   R/o Sarvapriya Viha, Behind Divyayog Mandir,
   Kankhal, District-Haridwar.
6. Manoj Pratap Singh,
   S/o Shri Kirat Singh,
   R/o C/o Master Sushil Kumar, Peeth Bazar,
   Bahadarabad, District-Haridwar.
7. Kishore Ram,
   S/o Shri Kishan Ram,
   R/o New Subhash Nagar, Haridwar.

District-Haridwar. .....Petitioners.

Vs.

1. State of Uttaranchal, through Secretary, Education, Civil Secretariat, Uttaranchal, Dehradun.
2. H.N.B. Garhwal, Unviersity,
   Srinagar, Garhwal, through its
   Registrar.
3. Sita Devi Memorial Institute of Education & Technology, Idgah Road, Jwalapur, Haridwar, through its Managing Director. .....Respondents.

Date: 10.08.2006

Hon'ble Rajesh Tandon, J.

Heard Sri Alok Singh, Sr. Advocate, assisted by Sri Shailendra Singh Chauhan, Advocate for the petitioners, Sri L.P. Naithani, Sr. Advocate, appearing on behalf of University, Sri N.B. Tiwari, Additional Advocate General, assisted by Sri J.P. Joshi, Advocate for the respondents no. 1 and Sri Ramji Srivastava, counsel for the respondent no.3.

By the present writ petition the petitioners have prayed for a writ of certiorari quashing the press note dated 30th September, 2005 (Annexure –9 to the writ petition) issued by the Secretary Higher Education, Govt. of Uttaranchal, Dehradun respondent no.1 by which Dr. V.C. Upreti was appointed as a nominee for counseling as well as for a writ of mandamus directing the respondents to appoint the counseller, who will conduct the counseling of petitioners for B.Ed. course in Sita Devi Memorial Institute of Education and Technology, Haridwar forthwith.

FACTUAL MATIX OF THE CASE.

Briefly stated, according to the case of the petitioners, they are graduate from the recognized University and are qualified to get admission in the B.Ed. courses after passing the Entrace Examination. As will appear from the record of the case that Sita Devi Memorial Institute of Education and Technology, was established in the year, 2005 and the same was affiliated with H.N.B. Garhwal University, Srinagar, Garhwal. The Institute is also approved by the National Council For Teacher Education Jaipur (NCTE Jaipur).

The petitioners have submitted that according to the policy of the State Government 50% of the seats will be reserved for the State Government Quota and remaining 50% will be filed up by the Committee of Management. The Institution was allotted hundred seats for B.Ed courses in accordance with the government policy. Accordingly the University got published an advertisement in the newspaper inviting applications for admission in B.Ed course, 2005 through Common B.Ed Entrance Examination.

In pursuance of the aforesaid advertisement, all the petitioners appeared in the Common B.Ed. Entrance Examination, 2005 conducted by the University and subsequently the result was declared on Internet. According to the case of the petitioners, they obtained the marks and were qualified in the merit list conducted by the Common Entrance Test known as C.E.T.

On 23rd August, 2005, according to the case of the petitioners, the institution/respondent no. 3 issued an advertisement in Hindi daily newspaper “Amar Ujala”, inviting application forms for admission of management quota in B.Ed. Course in the institution/respondent no. 3 among the candidates, who had appeared and passed the Common

Entrance Examination, 2005 conducted by the University. Petitioners obtained the prospectus and application form and deposited requisite fee and submitted their application forms within the prescribed period and merit list of the candidates was prepared. The names of the petitioners were shown in the merit list. However, thereafter, the petitioners approached the office of the respondent no. 3 with regard to the commencing of the classes, then the petitioners were informed that the same will be done only after the counseling of the petitioners by the counseller appointed by the State Government and the petitioners will be ensured about the counseling later on. He has requested for the appointment of the counseller on 21.10.2005. The letter given by Smt. Anju Sharma is quoted below:-

"विषयः– बी0एड0 पाठ्यक्रम में प्रबन्धकीय कोठे की सीटों की काउंसलिंग होतु प्रतिनिधि नामित करने के लिये। पत्रावली 20-709/XXIV (7) 2005.

महोदय,

आपको अवगत कराना है कि सीता देवी मेमोरियल इंस्टिट्यूट ऑफ एजूकेप्रन एण्ड टैक्नोलौजी ज्वालापुर हरिद्वार में बी0एड0 पाठ्यक्रम हेतु प्रबन्धकीय कोटे की सीटों की काउंसलिंग हेतु शासन द्वारा अपना प्रतिनिधि नामित करना आवश्यक है।

अतः श्रीमान जी से अनुरोध है कि काउंसलिगं हेतु अपना प्रतिनिधि शीघ्र नामित करने की कृपा करें।

भवदीय

श्रीमति अंजू शर्मा"

Later, on 30th April, 2006, Secretary Higher Education. Government of Uttaranchal, Dehradun issued a press note in Amar Ujala inviting applications from management quota for counseling. Press not was issued to the following effect:-

"प्रबन्धकीय कोटे की 50 प्रतिप्रत सीटों पर प्रवेप्र प्रक्रिया प्रारम्भ न होने के कारण प्रिक्षण कार्य प्रारम्भ नहीं हो पा रहा है ।

अतः छात्र हित को ध्यान में रखते हुए हेमवती नन्दन बहुगुणा गढ़वाल विश्वविद्यालय के सम्बद्ध संस्थाओं में प्रबन्धकीय कोटे की सीटों पर प्रवेश के लिए जिन अभ्यर्थियों द्वारा पूर्व में विभिन्न स्ववित्त पोषित संस्थाओं में आवेदन किया गया है, उनकौ इस विज्ञापन के माध्यम से सूचित किया जाता है कि वे संस्थाओं के नाम, जिनमें उनके द्वारा पूर्व में आवेदन किया गया है, वरीयता क्रम के अनुसार निम्नांकित प्रारूप में व्यक्तिगत / रजिस्टर्ड / स्पीड पोस्ट से दिनांक 07 मई, 2006 तक कुलसचिव, हेमवती नन्दन बहुगुणा गढ़वाल विश्वविद्यालय, श्रीनगर गिंढ़वालक्र उत्तरांचल को उपलब्ध करा दें:–

1– अभ्यर्थी का नामः–

2– अभ्यथी का बी0एड0प्रवेश परीक्षा का अनुक्रमांकः–

3– अभ्यर्थी का बी0एड0 प्रवेश परीक्षा का प्राप्तांकः–

4– वर्ग किला / वाणिज्य / विज्ञानक्र

5– संस्थाओं के नाम, वरीयता क्रम में विरीयता क्रम में 1 से लेकर जितनी संस्थाओं में निजी संस्थाओं की एसोसियेशन द्वारा प्रकाशित विज्ञापन के अनुक्रम में पूर्व में आवेदन किया हैक्र

6– प्रवेश प्रकिया स्ववित्त पोषित संस्थाओं द्वारा ही सम्पादित की जानी है। विश्वविद्यालय द्वारा नामित प्रतिनिधियों के द्वारा अनुमोदित होने के उपरान्त छात्रों को प्रवेश के लिए सूचना संस्थाओं की एसोसियेशन द्वारा समूहिक रूप से समाचार–पत्रों में प्रकाशित की जानी होगी, जिसमें छात्रों को प्रवेश के लिए उचित समय दिया जायेगा।"

नोट– निर्धारित तिथि के उपरान्त विकल्प–पत्र प्राप्त होने पर स्वीकार्य नहीं होगा। इस सम्बन्ध में जानकारी हेतु दूरभाष संख्या 0–1346–252143 एवं 252391 पर भी सम्पर्क किया जा सकता है।"

It may be pointed out that the Hon'ble High Court has framed a Committee headed by Justice V.N. Mehrotra.

While filing the writ petition, interim order was passed on 6th May, 2006 permitting the petitioners to appear in the counseling scheduled to be held subject to the final result of the writ petition. While passing the interim order reference of

the committee was also given, which was appointed by the Hon'ble the Chief Justice.

Reference of Special Appeal

Against the order dated 6th May, 2006, the respondents have filed a Special Appeal. The Special was disposed of by the Division Bench with the following directions:-

"8. Sri Naithani, the learned Senior Counsel for the appellants submits that the direction contained in the interim order runs counter to the dictum of the apex Court in the case of Islamic Academy of Education and another Vs. State of Karnataka and others reported in (2003) 6 SCC 697.

9. Sri Alok Singh, the learned, Senior Counsel for the respondents 1 to 7 and Sri Ramji Srivastaca, the learned counsel for respondent no. 8 could not dispute that the admissions to the colleges have to be in accordance with the directions of the apex Court in the case of Inslamic Academy of Education and another Vs. State of Karnataka which was explained in the case of P.A. Inamdar and others Vs. State of Maharashtra and others reported in (2005) 6 SCC 537.

10. In this view of the matter, the impugned interim order dated 06.05.2006 is substituted by the following order:

"The petitioners shall be provisionally permitted to appear in the counseling. The entire exercise for their admission shall be strictly in accordance with the dicta of the Apex Court in the case of Islamic Academy of Education and another Vs. State of Karnataka and other reported in (2003) 6 SCC 697, P.A. Inamdar and others Vs. State of Maharashtra and others reported in (2005) 6 SCC 537 and State of Maharashtra Vs. Sant Dnyaneshwar Shikshan Shstra Mahavidyalaya and others reported in 2006 AIR SCW 2048. The admission of the petitioners, if any, shall be subject to the final decision of the writ petition."

11. As the writ petitioners, who are students are running against time, we deem it proper to direct an out of turn hearing of the writ petition.

12. Sri Naithani, the learned Senior Counsel for the University and Sri Subhash Upadhyaya, the learned Sanding Counsel for the State undertake to file counter affidavit on behalf of the University and the State within three days.

13. We, therefore, direct the writ petition the posted for final hearing before the learned Single Judge on 16.06.2006.

14. With the above order, the Special Appeal stands disposed of.

15. Consequently, CLMA No. 6857 of 2006 also stands disposed of."

The Division Bench in special appeal has directed for deciding the matter in accordance with the judgment of the Apex Court in ***State of Maharashtra Vs. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya and others 2006 AIR SCW 2048 , P.A. Inamdar and others Vs. State of Maharashtra and others (2005) 6 SCC 537, Islamic Academy of Education and another Vs. State of Karnataka and others reported in (2003) 6 SCC 697, Brahmo Samaj Education Society Vs. State of West Bengal and others, T.M.A. Pai Foundation Vs. State of Karnataka.***

About Right to Education

Right to education has been recognized by the Apex Court from the time when the Apex Court has pronounced the judgment of ***Uni Krishanan Vs. State of A.P. (1993) 1 SCC 645*** to the following effect:-

"166. In Bandhu Mukti Morcha (1984) 3 SCC 161 this Court held that the right to life guaranteed by Article 21 does taken in "education facilities". (The relevant portion has been quoted hereinbefore.) Having regard to the fundamental significance of education to the life of an individual and the nation, and adopting the reasoning and logic adopted in the earlier decisions of this Court referred to hereinbefore, we hold, agreeing with the statement in Bandhua Mukti Morcha that right to education is implicit in and flows from the right to life guaranteed by Article 21. That the right to education has been treated as one of transcendental importance in the life of an individual has been recognized not only in this country since thousands of yeas, but all over the would. In Mohini Jain (1992) 3 SCC 666the importance of education has been duly and rightly stressed. The relevant observations have already been set out in para 7 hereinbefore. In particular, we agree with the observation that without education being provided to the citizens of this country, the objectives set forth in the Preamble to the Constitution cannot be achieved. The Constitution would fail. We do not think that the importance of education could have been better emphasized that in the above words. The importance of education was emphasized in the 'Neethishatakam' by Bhartruhari (First Century B.C.) in the following words:

"Translation:

Education is the special manifestation of man:

Education is the treasure which can be preserved without the fear of loss;

Education secures material pleasure, happiness and fame;

Education is the teacher of the teacher;

Education is God incarnate;

Education secures honour at the hands of the State, not money.

A man without education is equal to animal."

Constitutional Mandate

Education has been included in List No. 1 Entry 66 and List 1 Entry 25 of the 7th Schedule. The same is quoted below:-

"25. Maritime shipping and navigation, including shipping and navigation on tidal waters; provisions of education and training for the mercantile mariner and regulation 0f such education and training provided by States and other agencies.

66. Co-ordinance and determination of standards in institutions for higher education or research and scientific and technical institutions".

Article 41 deals with the education, the same is quoted below:-

"41. Right to work, to educate and to public assistance in certain cases.—*The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want."*

Background from T.M.A. Pai Foundation

In ***T.M.A. Pai Foundation Vs. Sate of Karnataka (2002) 8 SCC 481****, it has been held as under:-*

"27. In the case of Mohini Jain Vs. State of Karnataka (1992) 3 SCC 666 the challenge was to a notification of June, 1989, which provided for a fee structure, whereby for government seats, the tuition fee was Rs. 2000 per annum and for students from Karnataka, the fee was Rs. 25,000 per annum, while the fee for Indian students from outside

Karnataka, under the payment category, was Rs. 60,000 per annum. It has been contended that charging such a discriminatory and high fee violated constitutional guarantees and rights. This attack was sustained, and it was held that there was a fundamental right to education in every citizen, and that the State was duty-bound to provide education, and that the private institutions that discharge the State's duties were equally bound not to charge a higher fee than the government institutions. The Court then held that any capitation fee and would, therefore, be illegal. The correctness of this decision was challenged in Unni Krishnan case, where it was contended that if Mohini Jain ratio was applied, the educational institutions would have to be closed down, as they would be wholly unviable without appropriate funds, by way of tuition fees, from their students.

28. We will examine the decision un Unni Krishnan case. In this case, this Court considered the conditions and regulations, if any, which the State could impose in the running of private unaided/aided, recognized or affiliated educational institutions conducting professional courses such as Medicine, Engineering etc. The extent to which the fee could be charged by such an institution, and the manner in which admissions could be granted was also considered. This Court held that private unaided recognized/affiliated educational institutions running professional courses were entitled to charge a fee higher than that charged by to government institutions for similar courses, but that such a fee could not exceed the maximum limit fixed by the State. It held that commercialization of education was not permissible, and "was opposed to public policy and Indian tradition and therefore charging capitation fee was illegal". With regard to private aided recognized/affiliated

educational institutions, the Court upheld the power of the Government to frame rules and regulations in matters of admission and fees, as well as in matters such as recruitment and conditions of service of teachers and staff. Though a question was raised as to whether the setting up of an educational institution could be regarded as a business, profession or vocation under Article 19 (1) (g), this question was not answered. Jeevan Reddy, J., however, at p. 751, para 197, observed as follows:-

"While we do not wish to express any opinion on thue question whether the right to establish an educational institution can be said to be carrying on any 'occupation' within the meaning of Article 19(1)(g),--perhaps, it is –we are certainly of the opinon that such activity can neither be a trade or business nor can it be a profession within the meaning of Article 19 (1) (g). Trade or business normally connotes an activity carried on with a profit motive. Education has never been commerce in this country."

31. Counsel for the institutions, as well as the Solicitor-General submitted that the decision in Unni Krishnan case insofar as it had framed the scheme relating to the grant of admission and the fixing of the fee, was unreasonable and invalid. <u>However, its conclusion that children below the age of 14 had a fundamental right to free education did not call for any interference.</u>

37. Unni Krishnan judgment has created certain problems, and raised thorny issues. In its anxiety to check the commercialization of education, a scheme of "free" and "payment" seats was evolved on the assumption that the economic capacity of the first 50% of admitted students would be greater than the remaining 50%, whereas the converse has proved to be the reality, In this scheme, the

"Payment seat" student would not only pay for his own seat, but also finance the cost of a "free seat" classmate. When one considers the Constitution Bench's earlier statement that higher education is not a fundamental right, it seems unreasonable to compel a citizen to pay for the education of another, more so in the unrealistic would of competitive examinations which assess the merit for the purpose of admission solely on the basis of the marks obtained, where the urban students always have an edge over the rural students. In practice, it has been the case of the marginally less merited rural or poor student bearing the burden of a rich and well-exposed urban student.

54. The right to establish an educational institution can be regulated; but such regulatory measure must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of maladministration by those in charge of management. The fixing of a rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions.

Criteria regarding merit in T.M.A. Pai (supra)

58. For admission into any professional institution, merit must pay a important role. While it may not be normally possible to judge the merit of the applicant who seeks admission into a school, while seeking admission to a professional institution and to become a competent professional , it is necessary that meritorious candidates are not unfairly treated or put at a disadvantage by preferences sown to less meritorious but more influential applicants. Excellence in professional education would require that

grater emphasis be laid on the merit of a student seeking admission. Appropriate regulations for this purpose may be made keeping in view the other observations made in this judgment in the context of admissions to unaided institutions.

59. Merit is usually determined, for admission to professional and higher education colleges, by either the marks that the student obtains at the qualifying examination or school-leaving certificate stage followed by the interview, or by a common entrance test conducted by the institution, or in the case of professional colleges, by government agencies.

67. We now come to the regulations that can be framed relating to private unaided professional institutions.

68. It would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forego or discard the principle of merit. It would, therefore, be permissible for the university or the Government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/university and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counseling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the Government

according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges. The same principles may be applied to other non-professional but unaided educational institutions viz. graduation and postgraduation non-professional colleges or institutes.

69. In such professional unaided institutions, the management will have the right to select teachers as per the qualifications and eligibility conditions laid down by the State/university subject to adoption of a rational procedure of selection. A rational fee structure should be adopted by the management, which would not be entitled to charge a capitation fee. Appropriate machinery can be devised by the State or university to ensure that no capitation fee is charged and that there is no profiteering, though a reasonable surplus for the furtherance of education is permissible. Conditions granting recognition or affiliation can broadly cover academic and educational matters including the welfare of students and teachers."

Background form Islamic Academy Education

In ***Islamic Academy Education Vs. State of Karnataka and others (2003) 6 SCC Page 697,*** their Lordships of the Apex Court at the preamble of the judgment have referred to the following effect:-

"2. *Most of the petitioners/applicants before us are unaided professional educational institutions (both minority and non-minority). On behalf of the petitioners/applicants it was submitted that the answers given to the questions, as set out at the end of the majority judgment, lay down the true ratio of the judgment. It was submitted that any observations*

made in the body of the judgment had to be read in the context of the answers given. We are unable to accept this submission. The answers to the question, in the majority judgment in Pai case are merely a brief summation of the ratio laid down in the judgment. The ratio decidendi of a judgment has to be found out only on reading the entire judgment. In fact, the ratio of the judgment is what is set out in the judgment itself. The answer to the question would necessarily have to be read in the context of what is set out in the judgment and not in isolation. In case of any doubt as regards any observations, reasons and principles, the other part of the judgment has to be looked into. By reading a line here and there from the judgment, one cannot find out the entire ratio decidendi of the judgment. We, therefore, while giving our clarifications, are disposed to look into other parts of the judgment other than those portions which may be relied upon.

3. *Very briefly stated, the other submissions were as follows:*

On behalf of the petitioners/applicants it was also submitted that fixation of percentage of seats that could be filled in the unaided professional colleges, both minority and non-minority by the management, as done by various State Governments, was impermissible. It is further submitted that the private unaided professional educational institutions had been given complete autonomy not only as regards the admission of students but also as regards the determination of their own fee structure. It was submitted that these institutions could fix their own fee structure, which could include a reasonable revenue surplus for purposes of development of education and expansion of the institution, and that so long as there was no profiteering or charging of

capitation fees, there could be no interference by the Government. It was submitted that the right to admit students is an essential facet of the right to administer, and so long as admission to the unaided educational institutions is on a fair and transparent basis and on the basis of merit, the Government cannot interfere. It was submitted that these institutions are entitled to fill up all their seats by adopting/evolving a rational and transparent method of admission which ensures that merit is adequately taken care of. It was submitted that in any even the institutions should be given a choice and be allowed to admit students on the basis of ICSC or SSC or other such examinations. It was also suggested that educational institutions of a particular type may be permitted to associate themselves for the purposes of holding a common entrance test in each State.

6. *In view of the rival submissions the following questions arise for consideration:*

(1) whether of the rival educational institutions are entitled to fix their own fee structure;

(2) whether minority and non-minority educational institutions stand on the same footing and have the same rights;

(3) whether private unaided professional colleges are entitled to fill in their seats, to the extent of 100% and if not, to what extent; and

(4) <u>whether private unaided professional colleges are entitled to admit students by evolving their own method of admission."</u>

Background of P.A. Inamdar's case

In the case of ***P.A. Inamdar Vs. State of Maharashtra, (2005) 6 SCC 537,*** it has been held as under:-

"2. A coram of 11 Judges, not a common feature in the Supreme Court of India, sat to hear and decide T.M.A. Pai foundation v. State of Karnatak (hereinafter "Pai Foundation" for short). It was expected that the authoritative pronouncement by a Bench of such strength on the issues arising before it would draw a final curtain on those controversies. The subsequent events tell a different story. A learned academician observes that the eleven-Judge Bench decision in Pai Foundation is a parital response to some of the challenges posed by the impact of liberalisationi, privatization and globalisation (LPG); but the question whether that is a satisfactory response, in indeed debatable. It was further pointed that "the decision raises more questions than it has answerned". (See Annuar Survey of Indian Law, 2002 at pp. 251, 254.) The survey goes on to observe" the principles laid down by the majority in Pai Fondation are so broadly formulated that they provide sufficient leeway to subsequent courts in applying those principles while the lack of clarity in the judgment allows judicial creativity.

3. The prophecy has come true and while the ink on the opinions in Pai Foundation was yet to dray, the High Courts were flooded with writ petitions, calling for settlements of several issues which were not yet resolved or which cropped up post Pai Foundation. A number of special leave petitions against interim orders passed by the High Courts and a few writ petitions came to be filed directly in this Court. A Constitution Bench sat to interpret the eleven-Judge Bench decision in Pai Foundation which it did vide its judgment dated 14-8-2003 in Islaic Academy of Education v. State of Karnataka ("Islamic Academy" for short). The 11 learned Judges constituting the Bench in Pai Foundation

delivered five opinions. The majority opinion on behalf of six Judge was delivered by B.N. Kirpa, C.J. Khare, J. (as His Lordship then was) delivered a separate but concurring opinion, supporting the majority Quadri, J., Ruma Pal, J. and Variava, J. (for himself and Bhan, J.) delivered thee separate opinions partly dissenting from the majority. Islamic Academy too handed down two opinions. The majority opinion for four learned Judge was delivered by V.N. Khare, C.J. S.B. Sinha, J., delivered a separate opinions.

4. The events following Islamic Academy judgment show that some of the main questions have remained unsettled even after the exercise undertaken by the Constitution Bench in Islamic Academy in clarification of the eleven-Judge Bench decision in Pai Foundation. A few of those unsettled questions as also some aspects of clarification are before us calling for settlement by this Bench of seven Judges which we hopefully purpose to do.

5. Pai Foundation and Islamic Academy have set out the factual backdrop of the issues leading to the constitution of the eleven-Judge and five-Judge Benches respectively. For details thereof a reference may be made to the reported decisions. A brief summary of the past events, highlighting the issues as they have traveled in search of resolution would be apposite.

A. This question need not be answered not be answered by this Bench, it will be dealt with by a regular Bench.

Q.3. (b) To what extent can professional education be treated as a matter coming under minorities' rights under Article 30?

A. Article 30(1) gives religious and linguistic minorities the right to establish and administer educational institutions of their choice. The use of the words 'of their choice' indicates

that even professional educational institutions would be covered by Article 30.

Q.4. Whether the admission of students to minority educational institutions, whether aided or unaided, can be regulated by the State Government or by the university to which the institution is affiliated ?

A. Admission of students to unaided minority educational institutions viz. schools and undergraduate colleges where the scope for merit-based selection is practically nil, cannot be regulated by the State or university concerned, except for providing the qualification and minimum conditions of eligibility in the interest of academic standards.

(emphasis supplied)

The right to admit students being an essential facet of the right o administer educational institutions of their choice, as contemplated under Article 30 of the Constitution, the State Government or the university may not be entitled to interfere with that right, so long as the admission to the unaided educational institutions is on a transparent basis and the merit is adequately taken care of. The right to administer, not being absolute, there could be regulatory measures for ensuring educational standards and maintaining excellence thereof, and it is more son in the matter of admissions to professional institutions.

(emphasis supplied)

A minority institution does not cease to be so, the moment grant-in-aid is received by the institution. An aided minority educational institution, therefore, would be entitled t have the right of admission of students belonging to the minority group and at the same time, would be required to admit a reasonable extent of non-minority students, so that

the right under Article 30(1) are not substantially impaired and further the citizens' rights under Article 29(2) are not infringed. What would be a reasonable extent, would vary from the types of institution, the courses of education for which admission is being sought and other factors like educational needs. The State Government concerned has to notify the percentage of the non-minority students to be admitted in the light of the above observations. Observance of inter se merit amongst the applicants belonging to the minority group could be ensured. In the case of aided professional institutions, it can also be stipulated that passing of the common entrance test held by the State agency is necessary to seek admission.

15. Pai Foundation judgment was delivered on 31-10-2002. The Union of India, various State Government and the educational institution, each understood the majority judgment in its own way. The State Governments embarked upon enacting laws and framing the regulations, governing educational institutions in consonance with their own understanding of Pai Foundation.

(1) In professional institutions, as they are unaided, there will be full autonomy in their administration, but the principle of merit cannot be sacrificed, as excellence in professions is in the national interest.

(2) Without interfering with the autonomy of unaided institutions, the object of merit-based admissions can be secured by insisting on its as a condition to the grant of recognition and subject to the recognition of merit, the management can be given certain discretion in admitting students.

(3) The management can have quota for admitting students at its discretion but subject to satisfying the test of

merit-based admissions, which can be achieved by allowing the management to pick up students of their own choice from out of those who have passed the common entrance test conducted by the a centralized mechanism. Such common entrance test can be conducted by the State or by an association of similarly placed institutions in the State."

A. Admission

Six months prior to the commencement of the academic year, the Government would fix the percentage of students to be admitted by a minority (religious / linguistic) professional college (other than engineering), taking into account the local needs of the State, the region as well as that of the minority community. It would be a huge and cumbersome exercise in practice, to fix a percentage for each one of the institutions separately and it would be a pragmatic approach to have a fixed percentage for all the minority institutions which is fair and reasonable. A practical approach to the problem would require a very definite percentage to be fixed for minority institutions, say, 50% so that even if candidate of their choice, belonging to the minority institutions, are only 25% they would still have the right to select non-minority students to make up the 50% of course, from CET held by the Government.

1. CET held by the Government would ensure that the various devices adopted by professional colleges to secretly demand capitation fees and take the same in black money, thus resulting in merit being the casualty, would not take place. No prejudice will be caused to the management of the professional colleges

as they could select the minority students based on inter se merit in CET held by the Government.

2. *There would equally be no disadvantage to any particular section or the Government if the same 50% rule is applied even to unaided non-minority professional colleges as well.*

The result of following this procedure is that a consortium holding the tests for admission is done away with and a Montioring Committee. Preferably headed by a retired High Court or Supreme Court Judge would ensure fairness and transparency both in the minority and non-minority professional institutions."

106. S.B. Sinha, J. has,in his separate opinion is Islamic Academy described (in para 199) the situation as a pyramid-like situation and suggested the right of minority to be read with the fundamental duty. Higher the level of education, lesser are the seats and higher weighs the consideration for merit. It will, necessarily, call for more State intervention and lesser say for the minority.

107. Educational institutions imparting higher education i.e. graduate level and above and in particular specilalised education such as technical or profession, constitute a separate class. While embarking upon resolving issues of constitutional significance, where the letter of the Constitution is not clear, we have to keep in view the spirit of the Constitution, as spelt out by its entire scheme. Education aimed at imparting professional or technical qualifications stands on a different footing from other educational instruction. Apart form other provisions, Article 1996) is a clear indicator and so are clauses (h) and (j) of Article 51-A. Education up to the undergraduate level aims at imparting knowledge just to enrich the mind and shape the personality

of a student. Graduate-level study is a doorway to admissions in educational institutions imparting professional or technical or other higher education and, therefore, at that level, the considerations akin to those relevant for professional or technical educational institutions step ion and become relevant. This is in the national interest and strengthening the national wealth, education included. Education up to the undergraduate level on the one hand and education at the graduate and postgraduate levels and in professional and technical institutions on the other are to be treated on different levels inviting not identical considerations, is a proposition not open to any more debate after Pai Foundation. A number of legislations occupying the filed of education whose constitutional validity has been tested and accepted suggest that while recognition or affiliation may not be a must for education up to undergraduate level or, even if required, may be granted as a matter of routine, recognition or affiliation is a must and subject to rigorous scrutiny when it comes to educational institutions awarding degrees, graduate or postgraduate diplomas and degrees in technical or profession disciplines. Some such legislations are found referred in paras 81 and 82 of S.b Sinha, J.'s opinion in Islamic Academy.

108. Having so stated and clarified these principles which would be germane to answering the four questions posed before us, now we take up each of the four questions seriatim and answer the same.

109. And yet, before we do so, let us quote and reproduce paras 68, 69 and 70 from Pai Foundation to enable easy reference thereto as the core of controversy touching the four questions which we are dealing with seems to have

originated therefrom. These paragraphs reads as under: (SCC pp. 549-50).

"68. [(I)] It would be unfair to apply same rules and regulations regulating admission to both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forego or discard the principle of merit. It would, therefore, be permissible for the university or the Government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods.

[(II)] For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/university and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the Government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges. The same principles may be applied to other non-professional but unaided educational institutions viz. graduation and postgraduation non-professional colleges or institutes.

69. In such professional unaided institutions, the management will have the right to select teachers asper the qualifications and eligibility conditions laid down by the

State/university subject to adoption of a rational procedure of selection. A rational fee structure should be adopted by the management, which would not be entitled to charge a capitation fee. Appropriate machinery can be devised by the State or university to ensure that no capitation fee is charged and that there is no profiteering, though a reasonable surplus for the furtherance of education is permissible. Conditions granting recognition or affiliation can broadly cover academic and educational matters including the welfare of students and teachers.

70. It is well established all over the world that those who seek professional education must pay for it. The number of seats available in government and government-aided colleges is very small, compared to the number of persons seeking admission to the medical and engineering colleges. All those eligible and deserving candidates who could not be accommodated in government colleges would stand deprived of professional education. This void in the filed of medical and technical education has been filled by institutions that are established in different places with the aid of donations and the active part taken by public minded individuals. The object of establishing an institution has thus been to provide technical or professional education to the deserving candidates, and is not necessarily a commercial venture. In order that this intention is meaningful, the institution must be recognized. At the school level, the recognition or affiliation has to be sought from the educational authority or the body that conducts the school-leaving examination. It is only on the basis of that examination that a school-leaving certificate is granted, which enables a student to seek admission in further course of study after school. A college or a professional educational institution has to get recognition form the

university concerned, which normally requires certain conditions to be fulfilled before recognition. It has been held that conditions of affiliation or recognition, which pertain to the academic and educational character of the institution and ensure uniformity, efficiency and excellence in educational course are valid, and that they do not violate even the provisions of Article 30 of the Constitution; but conditions that are laid down for granting recognition should not be such as may lead to governmental control of the administration of the private educational institutions."

111. It was submitted at the Bar that a flourish of language or just a flow of thoughts placed on paper when read in isolation gives an impression as if such is the law laid down though in reality even the author of the judgment had not intended to do so. A mere observation or a reasoning leading to the formulation of the ultimate opinion on a disputed question of law cannot be read as a ratio of the decision. Such submissions forcefully advanced at the Bar, have been kept in view by us while reading the several opinions in Pai Foundation and Islamic Academy. In Islamic Academy the petitioner applicants were private unaided institutions (minority and non-minority both) and the petitioner applicants before us are also private unaided institutions, non-minority and minority (religious and linguistic) both. It was submitted that the majority opinion in Islamic Academy has, while embarking upon clarifying the law laid down in Pai Foundation not only reiterated some of the propositions of law laid down in Pai Foundation but has also added something more which was not said in Pai Foundation and the two have been so intertwined as to become inseparatable and that has been the reason for a spate of litigation post Islamic Academy. S.B. Sinha, J.

writing his separate opinion in Islamic Academy has not himself chosen to say whether his is a concurring opinion or a dissenting one. However, it was pointed out that S.B. Sinha, J's opinion is analytical, clear and more in consonance with the majority opinion of Pai Foundation. It was urged that the task was difficult and unwittingly, for the sake of aiming at brevity, certain omissions have taken place. Illustratively it was pointed out that vide SCC p. 546, para 59 of Pai Foundation Kirpal, C.J., has said:

"59. Merit is usually determined, for admission to professional and higher education colleges, by either the marks that the students obtains at the qualifying examination or school-leaving certificate stage followed by the interview, or by a common entrance test conducted by the institution, or in the case of professional colleges, by government agencies."

125. As per our understanding, neither in the judgment of Pai Foundation nor in the Constitution Bench decision in Kerala Education Bill which was approved by Pai Foundation is there anything which would allow the State to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions. This would amount to nationalization of seats which has been specifically disapproved in Pai Foundation. Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions. Such appropriation of seats can also not be held to be a regulatory measure in the interest of the minority within the meaning of

Article 30(1) or a reasonable restriction within the meaning of Article 19 (6) of the Constitution. Merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidates. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit.

126. The observations in para 68 of the majority opinion in Pai Foundation on which the learned counsel for the parties have much at variance in their submission, according to us, are not to be read disjointly from other parts of the main judgment. A few observations contained in certain paragraphs of the judgment in Pai Fundation if read in isolation, appear conflicting or inconsistent with each other. But if the observations made and the conclusions derived are read as a whole, the judgment nowhere lays down that unaided private educational institutions of minorities and non-minorities can be forced to submit to seat-sharing and reservation policy of the State. Reading relevant parts of the judgment on which earned counsel have made comments and counter-comments and reading the whole judgment (in the light of previous judgments of this Court, which have been approved in Pai Foundation) in our considered opinion, observations in para 68 merely permit unaided private institutions to maintain merit as the criterion of admission by voluntarily agreeing for seat-sharing with the State of adopting selection based on common entrance test of the State. There are also observations saying that they may frame their own policy to give freeships and

scholarships to the needy and poor students or adopt a policy in line with the reservation policy of the State to cater to the educational needs of the weaker and poorer sections of the society.

129. In Pai Foundation it has been very clearly held at several places that unaided professional institutions should be given grater autonomy in determination of admission procedure and fee structure. State regulation should be minimal and only with a view to maintain fairness and transparency in admission procedure and to check exploitation of the students by charging exorbitant money or capitation fees.

130. For the aforesaid reason, we cannot approve of the scheme evolved in Islamic Academy to the extent it allows the State to fix quota for seat-sharing between the management and the States on the basis of local needs of each State, in the unaided private educational institutions of both minority and non-minority categories. The part of the judgment in Islamic Academy in our considered opinion, does not lay down the correct law and runs counter to Pai Foundation.

132. Our answer to the first question is that neither the policy of reservation can be enforced by the State nor any quota or percentage of admission, can be cared out to be appropriated by the State in a minority or non-minority unaided educational institution. Minority institutions are free to admit students of their own choice including students of non-minority community as also members of their own community form other States, both to a limited extent only and not in a manner and to such an extent that their minority educational institution status is lost. If they do so, they lose the protection of Article 30 (1).

134. However, different considerations would apply for graduate and postgraduate level of education, as also for technical and professional educational institutions. Such education cannot be imparted by any institution unless recognized by or affiliated with any competent authority created by law, such as a university, Board, Central or State Government or the like. Excellence in education and maintenance of high standards at his level are a must. To fulfill these objectives, the State can and rather must, in national interest, step in. The education, knowledge and learning at this level possessed by individuals collectively constitutes national wealth.

136. Whether minority or non-minority institutions, there may be more than one similarly situated institutions imparting education in any one discipline, in any State. The same aspirant seeking admission to take education in any one discipline of education shall have to purchase admission forms from several institutions and appear at several admission tests conducted at different places on the same or different dates and there may be a clash of dates. If the same candidate is required to appear in several tests, he would be subjected to unnecessary and avoidable expenditure and inconvenience. There is nothing wrong in an entrance test being held for one group of institutions imparting same or similar education. Such institutions situated in one State or ion more than one State may join together and hold a common entrance test or the State may itself or through an agency arrange for holding of such test. Out of such common merit list the successful candidates can be indentified and chosen for being allotted to different institutions depending on the coursed of study offered, the number of seats, the kind of minority to which the institution belongs and other

relevant factors. Such an agency conducting the common entrance test ("CET" for short) must be one enjoying utmost credibility and expertise in the matter. This would better ensure the fulfillment of twine objects of transparency and merit. CET is necessary in the interest of achieving the said objectives and also for saving the students community form harassment and exploitation. Holding of such common entrance test followed by centralized counseling or, in other words, single-window system regulating admissions does not cause any dent in the right of minority unaided educational institutions to admit students of their choice. Such choice can be exercised from out of the list of successful candidates prepared at CET without altering the order of merit inter se of the students so chosen.

137. Pai Foundation has held that minority unaided institutions can legitimately claim unfettered fundamental right to choose the students to be allowed admission and the procedure therefore subject to its being fair, transparent and non-exploitative. The same principle applies to non-minority unaided institutions. There may be a single institution imparting a particular type of education which is not being imparted by any other institution and having its own admission procedure fulfilling the test of being fair, transparent and non-exploitative. All institutions imparting same or similar professional education can join together for holding a common entrance test satisfying the abovesaid triple tests. <u>The State can also provide a procedure of holding a common entrance test in the interest of securing fair and merit-based admissions and preventing maladministration.</u> The admission procedure so adopted by a private institution or group of institutions, if it fails to satisfy all or any of the triples tests, indicated hereinabove, can be taken over by the State substituting its own procedure. The second question is answered accordingly.

138. It needs to be specifically stated that having regard to the larger interest and welfare of the student community to promote merit, achieve excellence and curb malpractices, it would be permissible to regulate admissions by providing a centralized and single-window procedure. Such a procedure, to a large extent, can secure grant of merit-based admission on a transparent basis. Till regulations are framed, the Admission Committees can oversee admissions so as to ensure that merit is not the casualty.

142. Most vehement attack was laid by all the learned counsel appearing for the petitioner applicants on that part of Islamic Academy which has directed the constitution of tow Committees dealing with admissions and fee structure. Attention of the Court was invited to paras 35, 37, 38, 45 and 161 (answer to Question 9) of Pai Foundation wherein similar scheme framed in Unni Krishnana was specifically struck down. Vide para 45, Chief Justice Kirpal has clearly ruled that the decision in Unni Krishnan insofar as it framed the scheme relating to grant of admission and the fixing of the fee, was not correct and to that extent the said decision and the consequent directions given to UGC, AICTE, MCI, the Central and the State Governments, etc. Are overruled. Vide para 161, Pai Foundation upheld Unni Krishnan to the extent to which it holds the right to primary education as a fundamental rights, but the scheme was overruled. However, the principle that there should not be capitation fee or profiteering was upheld. Leverage was allowed to educational institutions to generate reasonable surplus to meet cost of expansion and augmentation of facilities which would not amount to profiteering. It was submitted that Islamic Academy has once again restored such Committees which were done away with by Pai Foundation."

Thereafter, Mohini Devi Vs. State of Karnataka (1992) 3 SCC 666, it has been held to the following effect:-

"12. "Right to life" is the compendious expression for all those rights which the courts must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. The right to education flows directly from right to life. The right to life under article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make endeavour to provide educational facilities at all levels to its citizens.

13. The fundamental rights guaranteed under Part III of the Constitution of India including the right to freedom of speech and expression and other rights under Article 19 cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individualistic dignity.

14. The "right to education", therefore, is concomitant to the fundamental rights enshrined under Part III of thue Constitution. The State is under a constitutional mandate to provide education institutions at all levels for the benefit of the citizens. The educational institutions must function to the best advantage of the citizens. Opportunity to acquire education cannot be confined to the richer section of the society."

But 'how to regulate the establishment of educational institutions have been broadly explained in the recent decisions from time to time.

However, the eleven Judge, so far as the case of Unni Krishnan (supra) is concerned, has observed as under:-

"Regulations can be framed governing service conditions for teaching and other staff for whom aid is provided by the State without interfering with over all administrative control of management over the staff, government university representative can be associated with the Selection Committee and the guidelines for selection can be laid down. In regard to unaided minority educational institutions and regulations, which will ensure a check over unfair practices and general welfare of teachers could be framed.

Q.9. Where the decision of this Court in Unni Krishnan, J.P. V. State of A.P. (except where it holds that primary education is a fundamental right) and the scheme framed thereunder requires reconsideration/modification and if yes, what?

A. The scheme framed by this Court in Unni Krishnan case and the direction to impose the same, except where it holds that primary education is a fundamental right, is unconstitutional. However, the principle that there should not be capitation fee or profiteering is correct. Reasonable surplus to meet cost of expansion and augmentation of facilities does not, however, amount to profiteering.

Q.11. What is the meaning of the expressions "education" and "educational institutions" in various provisions of the Constitution ? Is the right to establish and administer educational institutions guaranteed under the Constitution?

A. The expression "education" in the articles of the Constitution means and includes education at all levels, from the primary school level up to the postgraduate level. It includes professional education. The expression "educational

institutions" means institutions that impart education, where "education" is as understood hereinabove.

The right to establish and administer educational institutions is guaranteed under the Constitution to all citizens under articles 19 (1) (g) and 26, and to minorities specifically under Article 30.

All citizens have a right to establish and administer educational institutions under Articles 19(1) (g) and 26, but this regard will be subject to the provisions of Articles 19 (6) and 26(a). However, minority institutions will have a right to admit students belonging to the minority group, in the manner as discussed in this judgment."

Questions No. 3 and 4 have been dealt with together, reliance has been placed on paragraphs no. 58, 59 in T.M.A. Pai to the following effect:-

(Background of T.M.A. Pai Foundation Vs. State of Karnataka (2002) 8 SCC 481)

"11. In order to answer the third and fourth questions it is necessary to see the manner in which the majority judgment is framed and to consider certain paragraphs of the judgment. The majority judgment considered various aspects under different heads. The 3rd head is "In case of private institutions, can there be government regulations and, if so., to what extent?". This is further divided into four sub-headings viz. "Private unaided non-minority educational institutions". The paragraph which has been strongly relied upon in paragraph 68 which is under the sub-heading "Private unaided professional colleges". The said paragraph reads as under:

68. It would be unfair to apply the same rules and regulations regulating admission to both added and unaided professional institutions. It must be borne in mind that

unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forgo or discard the principle of merit. It would, therefore, be permissible for the University or the Government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/University and seats may be filled up on the basis of counseling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the Government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges. The same principles may be applied to other non-professional but unaided educational institutions viz. graduation and postgraduation non-professional colleges or institutes."

Reliance was also placed on paragraphs 58 and 59 to the following effect:

(Background of T.M.A. Pai Foundation Vs. State of Karnataka (2002) 8 SCC 481)

58. For admission into any professional institution, merit must pay an important role. While it may not be normally possible to judge the merit of the applicant who seeks admission into a school, while seeking admission to a professional institution and to become a competent professional, it is necessary that meritorious candidates are not unfairly treated or put at a disadvantage by preference shown to less meritorious but more influential applicants.

Excellence in professional education would require that greater emphasis be laid on the merit of a student seeking admission. Appropriate regulations for this purpose may be made keeping in view the other observations made in this judgment in the context of admissions to unaided institutions.

59. Merit is usually determined, for admission to professional and higher education college, by either the marks that the student obtains at the qualifying examination or school-leaving certificate stage followed by the interview, or by a common entrance test conducted by the institution, or in the case of professional colleges, by government agencies."

Based on the above paragraphs it had been submitted, on behalf of the Union of India, various State Governments and students that the majority judgment makes a clear distinction between professional educational institutions (both minority and non-minority) and other educational institutions i.e. schools and undergraduate colleges. The submission was that in professional institutions merit had to play an important role and that excellence in professional education required that for purposes of admission merit is determined by government agencies. It is submitted that paragraph 68 provides that in unaided professional colleges only a "certain" percentage of seats can be reserved for admission by the management. It is submitted that the said paragraph provides that it is permissible for the University or the Government to require a private unaided professional institute to provide for a merit-based selection. It was submitted that paragraph 68, read with paragraph 59, lays

down that in unaided professional colleges merit is to be determined by a common entrance test conducted by government agencies."

The bench has further made certain guidelines by holding that the judgment recognizes that in the national interest in producing good and efficient professionals and the national interest alone would prevail and the merit along is the criteria for admission. The word *'Common Entrance Test'* has been defined in respect of the professional colleges. The Bench has observed as under:-

"In our view what is necessary is a practical approach keeping in mind the need for a merit-based selection. Paragraph 68 provides that admission by the management can be by a common entrance test held by "itself or by the State/University". The words "common entrance test" clearly indicate that each institute cannot hold a separate test. We thus hold that the management could select students of their quota, either on the basis of the common entrance test conducted by the State or on the basis of a common entrance test to be conducted by an association of all colleges of a particular type in that State e.g. medical, engineering or technical etc. The common entrance test, held by the association, must be for admission to all colleges of that type in the State. The option of choosing, between either of these tests, must be exercised before issuing of prospectus and after intimation to the concerned authority and the Committee set up hereinafter. If any professional college chooses not to admit from the common entrance test conducted by the association then that college must necessarily admit form the common entrance test conducted by the State. After holding the common entrance test and declaration of results the merit list will immediately be placed on the notice-board of all

colleges which have chosen to admit as per this test. A copy of the merit list will also be forthwith sent to the concerned authority and the Committee. Selection of students must then be strictly on the basis of merit as per that merit list."

FORMATION OF COMMITTEE

In the case of Islamic Academy Education (supra) the criteria which has been adopted is the University/State to provide merit based selection at the time of granting admission or evaluation and the respective State Governments have been directed to appoint the permanent committee, who will ensure that the test conducted by the Association of the Colleges is fair and transparent. For each State a separate commit shall be formed headed by a retired Judges of the High Court to be nominated by the Chief Justice of that State. The role of committee will be for supervising that the test is conducted in a fair and transparent manner. The observations of the apex Court to that effect are quoted below:-

"18. Lastly, it must be mentioned that it was urged by the learned counsel for the appellant that paragraph 68 of the majority judgment only permits the University/State to provide for merit-based selection at the time of granting recognition/affiliation. It was also submitted that once recognition/affiliation is granted to unaided professional colleges, such a stipulation cannot be provided subsequently. We are unable to accept this submission. Such a provision can be made at the time of granting recognition/affiliation as well as subsequently after the grant of such recognition/affiliation.

19. We now direct that the respective State Governments do appoint a permanent Committee which will ensure that the tests conducted by the association of colleges

is fair and transparent. For each State a separate Committee shall be formed. The Committee would be headed by a retired Judge of the High Court. The Judge is to be nominated by the Chief Justice of that State. The other member, to be nominated by the Judge, would be a doctor or an engineer of eminence (depending on whether the institution is medical or engineering/technical). The Secretary of the State in charge of Medical or Technical Education, as the case may be, shall also be a member and act as the Secretary of the Committee. The Committee will be free to nominate/co-opt an independent person of repute in the field of education as well as one of the Vice-Chancellors of the University in that State so that the total number of persons on the Committee do not exceed five. The Committee shall have powers to oversee the tests to be conducted by the association. This would include the power to call for the proposed question paper(s), to know the names of the paper-setters and examiners and to check the method adopted to ensure papers are not leaked. The Committee shall supervise and ensure that the test is conducted in a fair and transparent manner. The Committee shall have the power to permit an institution, which has been established and which has been permitted to adopt its own admission procedure for the last, at least, 25 years, to adopt iots own admission procedure and if the Committee feels that the needs of such an institute are genuine, to admit, students of their community, in excess of the quota allotted to them by the State Government. Before exempting any institute or varying in percentage of quota fixed by the State, the State Government must be heard before the Committee. It is clarified that different percentage of quota for students to be admitted by the management in each minority or non-minority unaided professional colleges(s) shall be separately

fixed on the basis of their need by the respective State Governments and in case of any dispute as regards fixation of percentage of quota, it will be open to the management to approach the Committee. It is also clarified that no institute, which has not been established and which has not followed its own admission procedure for the last, at least, 25 years, shall be permitted to apply for or be granted exemption from admitting students in the manner set out herinabove.

195. However, there may not be any permanent Committee functioning as a tribunal. Such a body, if any, must be created under a statute. A Tribunal with an adjudicatory power should not be directed to be created by this Court in exercise of its power under article 142 of the Constitution of India. This direction is only interim in nature and is being issued in the interest of all concerned. It is, therefore, clarified that the body created in terms of this judgment would function only so long a statutory body, if any, does not come into being by reason of a statute or statutory rules. The legislature or the rule-making authority may, however, lay down the procedure for proper functioning thereof."

The reference with regard to appointment of committee came up in P.A. Inamdar (supra) and the Bench has approved the observations made in Islamic Education Academy (supra) to the following effect:-

"21. It is pertinent to note, vide paras 2, 3 and 35 of Islamic Academy that most of petitioners/applicants therein were unaided professional educational institutions (both minority and non-minority). The purpose of constittuiong the Constitution Bench, as noted at the end of Para 1, was "so that doubts/anomalies, if any, could be clarified". Having answered the questions, the Constitution Bench treated all interlocutory applications as regards interim matters as disposed of (see para 23). All the main matters (writ

petitions, transfer petitions and special leave petitions) were directed to be placed before the regular Benches for disposal on merits.

22. Islamic Academy in addition to giving clarification on interlocutory applications, directed setting up of two Committees in each State: one Committee "to give effect to the judgment in Pai Foundation" and to approve the fee structure or to propose some other fee which can be charged by minority institutions (vide para 7), and the other Committee to oversee the tests to be conducted by the association of institutions (vide para 19).

23. Since the direction made in Islamic Academy for appointment of the Committees has been vehemently assailed during the course of hearing before us, we would extract from the judgment in Islamic Academy the following two passages wherein, in the words of Khare, C.J., the purpose and the functions enjoined upon them are given.

"[W]e direct that in order to give effect to the judgment in T.M.A. Pai case the respective State Governments/authority concerned shall set up, in each State, a committee headed by a retired High Court Judge who shall be nominated by the Chief Justice of that State The other member who shall be nominated by the Judge, should be a Chartered Accountant of repute. A representative of the Medical Council of India (in short 'MCI'), or the All India Council for Technical Education (in short 'AICTE'), depending on the type of institution, shall also be a member. The Secretary of the State Government in charge of Medical Education or Technical Education, as the case may be, shall be a member and Secretary of the Committee. The Committee

shall not exceed five. Each educational institute must place before this Committee, well in advance of the academic year, its proposed fee structure. Along with the proposed fee

structure al relevant documents and books of accounts must also be produced before the Committee for their scrutiny. The Committee should be free to nominate/co-opt another independent person of repute, so that the total number of members of the Committee shall not exceed five. Each educational institute must place before this Committee, well in advance of the academic year, its proposed fee structure. Along with the proposed fee structure all relevant documents and books of accounts must also be produced before the Committee for their scrutiny. The Committee shall then decide whether the fees proposed by that institute are justified and are not profiteering or charging capitation fee. The Committee will be at liberty to approve the fee structure or to propose some other fee which can be charged by the Institute. The fee fixed by the Committee shall be binding for a period of three years, at the end of which period the institute would be at liberty to apply for revision. Once fees are fixed by the Committee, the institute cannot charge either directly or indirectly any other amount over and above the amount fixed as fees. If any other amount is charged, under any other head or guise e.g. donations, the same would amount to charging of capitation fee. The Governments/appropriate authorities should consider framing appropriate regulations, if not already framed, whereunder if it is found that an institution is charging capitation fees or profiteering that institution can be appropriately penalized and also face the prospect of losing its recognition/affiliation

142. Most vehement attack was laid by all the learned counsel appearing for the petitioner applicants on that part

of Islamic Academy which has directed the constitution of two Committees dealing with admissions and fee structure. Attention o the Court was invited to paras 35, 37, 38, 45 and 161 (answer to Question 9) of Pai Foundation wherein similar

scheme framed in Unni Krishnan was specifically struck down.Vide para 45, Chief Justice Kripal has clearly ruled that the decision in Unni Krishnan insofar as it faramed the scheme relating to the grant of admission and the fixing of the fe, was not correct and to that extent the said decision and the consequent directions given to UGC, AICTE, MCI, the Centrla and the State Governments, etc. are overruled. Vide para 161, Pai Foundation upheld Unni Krishnan to the extent to which it holds the right o primary education as a fundamental right, but the scheme was overruled. However, the principle that there should not be capitation fee or profiteering was upheld. Leverage was allowed to educational institutions to generate reasonable surplus to meet cost of expansion and augmentation of facilities which would not amount to profiteering. It was submitted that Islamic Academy has once again restored such Committees which were done away with by Pai Foundation."

The aforesaid committee according to the Apex Court has been set up under Article 142 of the Constitution of India till the appropriate legislation is enacted by the Parliament under Article 142 of the Constitution of India. Article 142 of the Constitution of India provides as under:-

"142. *Enforcement of decrees and order of Supreme Court and orders as to discovery, etc.-(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as in necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribed.*

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance

of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself."

Constitution of India provides for legislative enactment in the matter of education and determining the standards in institution as for higher education and further regulating admission and prohibiting charges, capitation fees."

In the judgment of Hon'ble Mr. Justice S.B. Sinha in the case of Islamic Academy, his Lordship has observed the necessity of Common Entrance Test known as (C) (E) (T).

Hon'ble Mr. Justice S.B. Sinha while delivering his observations has held as under:-

"*The right to admit students being an essential facet of the right to administer educational institutions of their choice, as contemplated under Article 30 of the Constitution, the State Government or the University may not be entitled to interfere with that right, so long as the admission to the unaided educational institutions is on a transparent basis and the merit is adequately taken care of. The right to administer, not being absolute, there could be regulatory measures for ensuring educational standards and maintaining excellence thereof, and it is more so in the matter of admissions to professional institutions.*

A.5(b) While giving aid to professional institutions, it would be permissible for the authority giving aid to prescribe bye-rules or regulations, the conditions on the basis of which admission will be granted to different aided colleges

by virtue of merit, coupled with the reservation policy of thue State qua non-minority students. The merit may be determined either though a common entrance test conducted by the University or the Government concerned followed by counseling, or on the basis of an entrance test conducted by individual institutions-the method to be followed is for the University or the Government to decide. The authority may

also devise other means to ensure that admission is granted to an aided professional institution on the basis of merit. In the case of such institutions, it will be permissible for the Government or the University to provide that consideration should be shown to the weaker sections of the society."

Further questions have been framed in following paragraph:-

"52. *The conflict has to be resolved keeping the aforementioned findings in view*

Core questions

(i) Whether unaided professional institutions are entitled to lay down their own fee structure?

(ii) Whether in view of the judgment of this Court in T.M.A. Pai Foundation private and unaided professional institutions are entitled to have their own admission programme?

(iii) Whether the State Governments are entitled to lay down the quota of total seats to be filled up by the management?

76. Since the object of setting up of an educational institution is charitable in nature, capitation fee and profiteering cannot be allowed to be indulged in:

(a) Although the institutions may generate a reasonable revenue surplus for the purpose of development of education and expansion of the institutions.

(b) For admission in professional institutions, merit must play an important role and meritorious candidates should not be treated unfairly or put at a disadvantage by preference shown to less meritorious but more influential applicants.

77. Exellence in professional education would require that greater emphasis be laid on the merit of a

student seeking admission for which appropriate regulations can be made.

78. As regard determination of merit, it was stated : (SCC p. 546, paragraph 59)

"59. Merit is usually determined, for admission to professional and higher education colleges, by either the marks that the student obtains at the qualifying examination or school-leaving certificate stage followed by the interview, or by a common entrance test conducted by the institution, or in the case of professional colleges, by government agencies."

79. Educational institutions, however, cannot grant admission on their whims and fancies and must follow some identifiable or reasonable methodology of admitting the students. Any scheme, rule or regulation that does not give an institution the right to reject candidates who might otherwise be qualified according to, say, their performance in an entrance test, would be an unreasonable restriction under Article 19(6), though appropriate guidelines/modalities can be prescribed for holding the entrance test in a fair manner. Even when students are required to be selected on the basis of merit, the ultimate decision to grant admission to the students who have otherwise qualified for the grant of admission must be left with the educational institution concerned. However, when the institution rejects some students, such rejection must not be whimsical or for extraneous reasons.

(SCC para 65, p. 548-49)

80. The principles governing unaided professional colleges were dealt with separately in paragraphs 67, 68 and 69, the relevant portions whereof read thus:

"68. It would be unfair to apply the same rules and regulations regulating admission to both aided and unaided

professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forgo or discard the principle of merit. It would, therefore, be permissible for the University or the Government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/University and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counseling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the Government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges. The same principles may be applied to other non-professional but unaided educational institutions viz. graduation and postgraduation non-professional colleges or institutes.

194. For the aforementioned purpose also, a machinery should be evolved ion the respective States, the decision of which shall be final and binding.

195. However, there may not be any permanent Committee functioning as a tribunal. Such a body, if any, must be created under a statute. A Tribunal with an adjudicatory power should not be directed to be created by this Court in exercise of its power under Article 142 of the Constitution of India. This direction is only interim in nature

and is being issued in the interest of all concerned. It is, therefore, clarified that the body created in terms of this judgment would function only so long a statutory body, if any, does not come into being by reason of a statute or statutory rules. The legislature or the rule-making authority may, however, lay down the procedure for proper functioning thereof."

So far as the merit is concerned, the same has been held to be national interest in the matter and to acquire casualness of a higher caliber has been held to be an only criteria in the judgment of ***Islamic Academy Education (supra).*** Paragrph 196 to that effect is quoted below:-

"197. *Secondly, not only to maintain high standard of education, but also to maintain uniformity of standard, the right of selection of candidates for any professional course cannot be left to the discretion of any individual management. Efforts must be made to find out one single standard for all the institutions.*

223. The superior courts in India exist for interpretation of the Constitution or interpretation of statutes. They cannot evolve a foolproof system on the basis of affidavit filed by the parties or upon hearing their counsel. Certain details of vexing problems on the basis of the

interpretation given by this Court must be undertaken by the statutory bodies which have the requisite expertise. It is expected that statutory bodies would be able to perform their duties for which they have been established. The doors of the Court should not be knocked every time, if a problem arises in implementation of the judgment, however, slight it may be. The Court has its own limitation. The problems which can be sorted at the ground level by holding consultations should not be allowed to be brought to the Court. It is in that view of the

matter, we have thought it fit to direct setting up of committees for the aforementioned purposes.

224. in the present constitutional set-up, having regard to Entry 66 List 1 of the Constitution of India, the legislative power of the State may be very limited; the extent where of may have to be determined in appropriate cases. But the stake of the State in such matters is also not minimal. The State has to evolve its own policies generating the source of employment.

225. We have come across serval schemes framed by the States in terms whereof incentives are being given to the private industries for generating employment or reduction in taxes is being proposed if graduates are employed. The respective States, therefore, must apply their mind while granting essentiality certificate inasmuch as the human resource development problems will have to be faced by them. In evolving a sound policy decision in this behalf, the statutory bodies shall also have to lend their ears to the respective State Governments while granting permission for establishment of the professional educational institutions. The Human Resource Development Ministry of the Central Government should also play its role."

The Bench hearing the special appeal has also directed for taking into consideration the judgment reported in ***State of Maharashtra Vs. Sant Dnyandeshwar Shikshan Shastra Mahavidyalaya & others 2006 AIR SCW 2048,*** where taking into consideration that the education has been included in 7th Schedule Item No.25 National Council For Teacher Education has been constituted. The Bench has observed as under:-

"15. The National Council for Teacher Training Act, 1993 has been enacted by Parliament and deals with teacher's education. It came into force with effect from July 1, 1995. The Preamble of the Act is relevant and reads thus:

"An Act to provide for the establishment of a National Council for Teacher Education with a view to achieving planned and co-ordinated development of the teacher education system throughout the country, the regulation and proper maintenance of norms and standards in the teacher education system and for matters connected therewith."

It was also submitted that under the scheme of the Constitution, particularly Articles 245, 246, 248 and 254 read with Schedule VII thereof, only Parliament has power of co-ordination and determination of standards in institutions for higher education or research, scientific and technical institutions. State Legislature have no authority to enact any law in the filed covered by Entry 66 of List 1 of Schedule VII. Obviously, therefore, State Government has no authority to take a policy decision in respect of the subjects covered by Entry 66 of List 1 of Schedule VII for which a specific enactment has been made by Parliament and under the said Act authority has been granted to NCTE to take an action. As to Regulations and Guidelines, it was submitted that under the Act power had been conferred on NCTE. It is, therefore,

only NCTE, which can consider the question and take appropriate decision under the Act."

19. Section 16 opens with a non-obstante clause and requires an affiliating body to granjt affiliation only after recognition or permission by the Council. Contravention of the provisions of the Act and consequences thereof have been specified in Section 17. Appellate provision is found in Section 18.

20. Section 31 of the Act enables the Central Government to make Rules to carry out the purposes of the Act. Likewise, Section 31 (1) empowers the Council to make Regulations not inconsistent with the provisions of the Act and the Rules made thereunder for the purpose of carrying out of the provisions of the Act. Sub-section (2) of Section 32 expressly states that in particular and without prejudice to the generality of power to make Regulations, such Regulations may provide for the matters enumerated in clauses (a) to (p). Clauses (d), (e), (f) and (g) are relevant and read thus :

"(d) the norms, guidelines and standards in respect of-

(i) the minimum qualifications or a person to be employed as a teacher under clause (d) of Section 12;

(ii) the specified category of courses or training in teacher education under clause (e) of Section 12;

(iii) Starting of new courses or training in recognized institutions under clause (f) of Section 12;

(iv) standards in respect of examinations leading to teacher education qualifications referred to in clause (g) of Section 12;

(v) the tuition fees and other fees chargeable by institutions under clause (h) of Section 12;

(vi) the schemes for various levels of teacher education, and identification of institutions for offering teacher development programmes under clause (1) of Section 12;

"(e) the form and the manner in which an application for recognition is to be submitted under sub-section (1) of Section 14;

(f) conditions required for the proper functioning of the institution and conditions for granting recognition under clause (a) of sub-section (3) of Section 14;

(g) the form and the manner in which an application for permission is to be made under sub-section (1) of Section 15;.

22. Regulation 8 imposes conditions for recognition and reads thus:

"8. Condition for recognition-(a) Regional Committee shall satisfy itself on the basis of scrutiny and verification of facts as contained in the application for recognition and/or recognition of the institution where considered necessary or in any other manner deemed fit, that the institutions have adequate financial resources, accommodation, liberty, qualified staff, laboratory and such other conditions required for the proper functioning of the institutions for the course of training in teacher education which are being offered or intending to offer.

23. It appears that NCTE had framed Guidelines for the State Government / Union Territory by a notification, dated February 2, 1996 for issuance of NOC. The relevant Guidelines read thus:

"1. The establishment of Teacher Training institutions by Government, private managements or any other agencies should largely be determined by assessed need

for trained teachers. This ned should take into consideration the supply of trained teachers from existing instructions, the requirement of such teachers in relation to enrolment projections at various stages, the attrition rates among trained teachers due to superannuation, change of occupation, death etc. and the number of trained teachers on the live register of the employment exchanges seeking

employment and the possibility of their deployment. The States having more than the required number of trained teachers may not encourage opening of new institutions for teacher education or to increase the intake.

2. States having shortage of trained teachers may encourage establishment of new institutions for teacher education and to increase intake capacity for various levels of teacher education institutions keeping in view the requirements of teachers estimated for the next 10-15 years.

3. Preference might be given to institutions which tend to emphasize the preparation of teachers for subjects (such as Science, Mathematics, English etc.) for which trained teachers have been in short supply in relation to requirement of schools.

4. Apart from the usual courses for teacher preparation, institutions which propose to concern themselves with new emerging specialties (e.g. computer education, use of electronic media, guidance and counselling etc.) should receive priority. Provisions of these should however, be made only after ensuring that requisite man powers, equipment and infrastructure are available. These considerations will also be kept in view by the institutions will also be kept in view by the institution intending to provide for

optional subjects to be chosen by students such as guidance and counseling special education etc.

5. With a view to ensuring supply of qualified and trained teachers for such specialties such as education of the disabled, non-formal education, education of adults, preschool education, vocational education etc. special efforts and incentives may be provided to motivate private

managements/voluntary organizations for establishment of institutions, which lay emphasis on these areas.

6. With a view to promoting professional commitment among prospective teachers, institutions which can ensure adequate residential facilities for the Principal and staff of the institutions as well as hostel facilities for substantial proportion of its enrolment should be encouraged.

7. Considering that certain areas (tribal, hilly regions etc.) have found it difficult to attain qualified and trained teachers, it would be desirable to encourage establishment of trained institutions in those areas.

8. Institutions should be allowed to come into existence only if the sponsors are able to ensure that they have adequate material and manpower resources in terms, for instance, of qualified teachers and other staff, adequate buildings and other infrastructure (laboratory library etc.), a reverse fund and operating funds to meet the day-to-day requirements of the institutions, including payment of salaries provision of equipment etc. Laboratories, teaching science methodologies and practical should have adequate gas-plants, proper fittings and regular supply of water, electricity etc. They should also have adequate arrangements. Capabilities of the institution for filing norms prepared by NCTE may be kept in view.

9. In the establishment of an institution preference needs to be given to locations which have a large catchment area in terms of schools of different levels where student teachers can be exposed to demonstration lessons and undertake practice teaching. A training institution which has a demonstration school where innovative and experimental approaches can be demonstrated could be given preference."

"Teacher Education

The Centrally Sponsored Scheme of Teacher Education was launched in 1987-88 to create an institutional infrastructure to provide academic and technical resource support for continuous education and training of school teachers. While District Institutes of Education and Training (DIETs) set up under the Scheme to provide academic resource support to formal and non-formal elementary school teachers, colleges of Teacher Education (CETs) and Institutes of Adavanced Study in Education (IASEs) have been given the responsibility of organizing pre-service and in service training of secondary school teachers. IASEs are also expected to conduct programmes for the preparation of elementary school teacher educators.

The Scheme has been revised for the Tenth Plan and guidelines of the revised Scheme were issued to States in January 2004, with emphasis on operationalising sanctioned DIETs, CTEs abnd IASEs in an optimum manner, and on improviing the quality of teacher training programmes in them. Since the inception of the Scheme in 1987-88, a total of 550 DIETs/DRCs and 131 CTEs/IASEs have sanctioned/ approved up to December, 2004."

57. It is thus clear that the Central Government has considered the subject of the secondary education and higher

education at the national level. The Act of 1993 also requires Parliament to consider Teacher Education System "throughout the country.' NCTE, therefore in our opinion, is expected to deal with applications for establishing new B.Ed. colleges or allowing increase in intake capacity, keeping in view 1993 Act and planned and co-ordinated development of teacher-education system in the country.

As per the scheme of the Act, once recognition has been granted by NCTE under Section 14 (6) of the Act, every University ('examining body') is obliged to grant affiliation to

such institution and Section 82 and 83 of the University act do not apply to such cases."

In ***Brahmo Samaj Education Society Vs. State of West Bengal*** (Supra), counsel for the petitioners has referred paragraph 6 of the judgment, which has followed the judgment of T.M.A. Pai Foundation. Paragraph 6 is quoted below:-

"6. The question now before us is to decided whether the appointment of teachers in an aided institute by the College Service Commission by restricting the petitioners' right to appointment is a reasonable restriction in the interest of general public or not. The petitioners have a right to establish and administer education institution. Merely because the petitioners are receiving aid, their autonomy of administration cannot be totally restricted and institutions cannot be treated as a government-owned one. Of course the State can impose such conditions as are necessary for the proper maintenance of standards of education and to check maladministration. It is stated in T.M.A. Pai that:

"71. While giving aid to professional institutions, it would be permissible for the authority giving aid to prescribed by rules or regulations, the conditions on the basis of which admission will be granted to different aided colleges by virtue

of merit, coupled with the reservation policy of the State. The merit may be determined either through a common entrance test conducted by the university or Government followed by counseling, or on the basis of an entrance test conduced by individual institutions- the method to be followed is for the university or the Government to decide. The authority may also devise other means to ensure that admission is granted to an aided professional institution on the basis of merit. In the case of such institutions, it will be permissible for the Government or the university to provide that

consideration should be shown to the weaker sections of the society. (SCC at.550, para 71)

72. One aid is granted to a private professional education institution, the government or the State agency, as a condition of the grant of aid, can put fetters on the freedom in the matter of administration and management of the institution. The State, which gives aid to an educational institution, can imposes such conditions as are necessary for the proper maintenance of the high standards of education as the financial burden is shared by the State. The State would also be under an obligation to protect the interest of the teaching and non-teaching staff. In many States, there are various statutory provisions to regulate the functioning of such educational institutions where the States give, as a grant or aid, a substantial proportion of the revenue expenditure including salary, pay and allowance of teaching and non-teaching staff. It would be its responsibility to ensure that the teachers working in those institutions are governed by proper service conditions. The State, in the case of such aided institutions, has ample power to regulate the method of selection and appointment of teachers after prescribing requisite qualification for the same. Ever since in Kerala

Education Bill, 1957, Re this Court has upheld in the case of aided institutions, those regulations that served the interests of students and teachers. Checks on the administration may be necessary in order to ensure that the administration may be necessary in order to ensure that the administration is efficient and sound and will serve the academic needs of the institutions. In other words, rules and regulations that promote good administration and prevent maladministration can be formulated so as to promote the efficiency of teachers, discipline and fairness in administration and to preserve

harmony among affiliated institutions. At the same time it has to be ensured that even an aided institutions does not become a government-owned and controlled institution. Normally, the aid that is granted is relatable to the pay and allowances of the teaching staff. In addition, the management of the private aided institutions has to be incur revenue and capital expenses. Such aided institutions cannot obtain that extend of autonomy in relation to management and administration as would be available to a private unaided institution, but at the same time, it cannot also be treated as an educational institution departmentally run by Government or as a wholly woned and controlled government institution and interfere with constitution of the governing bodies or thrusting the staff without reference to management. (SCC pp. 550-51 para 72)

As will appear from the aforesaid, that in accordance with the judgment of the Islamic Academy Education as well as T.M.A. Pai, the Common Entrance Test has already been approved. Now then comes the judgment of ***P.A. Inamdar*** where 7 judges by the apex court has formulated the following question as under:-

"4. The events following Islamic Academy judgment show that some of the main questions have remained unsettled even after the exercise undertaken by the Constitution Bench in Islamic Academy in clarification of the eleven-Judge Bench decision in Pai Foundation. A few of those un settled questions as also some aspects of clarification are before us calling for settlement by this Bench of seven Judges which we hopefully propose to do.

5. Pai Foundation and Islamic Academy have set out the factual backdrop of the issues leading to the constitution of the eleven-Judge and five-Judge Benches respectively. For

details thereof a reference may be made to the reported decisions. A brief summary of the past events, highlighting the issues as they have traveled in search of resolution would be apposite.

7. Education has since long been a matter of ligation. Law reports are replete with ruling touching and centering around education in its several aspects. Until Pai Foundation there were four oft-quoted leading cases holding the field of education. They were Unni Krishna, J.P. v. State of A.P. (1993) 1 SCC 645, St. Stephen's College v. University of Delhi (1992) 1 SCC 558, Ahmedabad St. Xavier's College Society v. State of Gujarat (1974) 1 SCC 717 and Kerala Education Bill, 1957 1959 SCR 995. For convenience sake, these cases will be referred to as Unni Krishnan, St. Stephen's, St. Xavier's and Kerala Education Bill respectively. All these case among others came up for consideration of this Court in Pai Foundation."

9. An event of constitutional significance which had already happened was taken note of by the Constitution Bench. "Education" was a State subject in view of the following Entry 11 placed in List II- State List:

"11. Education including universities, subject to the provisions of Entries 63, 64, 65 and 66 of List 1 and Entry 25 of List III."

12. In pai Foundation Eleven questions were framed for being answered. Detailed submissions were made centering around the eleven questions. The Court dealt with the questions by classifying the discussion under the following five heads:

"1. Is there a fundamental right to set up educational institutions and if so, under which provision? (SCC p. 533).

2. Does Unni Krishnan case required reconsideration?

3. In case of private institutions, can there be government regulations and, if so, to what extent?

4. In order to determine the existence of a religious on linguistic minority in relation to Article 30, what is to be the unit-the State or the country as a whole?

5. To what extent can the right of aided private minority institutions to administer be regulated?

Q.3 (a) What are the indicia for treating an educational institution as a minority educational institution? Would an institution be regarded as a minority educational institution because it was established by a person(s) belonging to a religious or linguistic minority or its being administered by a person(s) belonging to a religious or linguistic minority?

A. This question need not be answered not be answered by this Bench, it will be dealt with by a regular Bench.

Q.3. (b) To what extent can professional education be treated as a matter coming under minorities' rights under Article 30?

A. Article 30(1) gives religious and linguistic minorities the right to establish and administer educational institutions of their choice. The use of the words 'of choice' indicates that even professional educational institutions would be covered by Article 30.

Q4. Whether the admission of students to minority educational institutions, whether aided or unaided, can be regulated by the State Government or by the university to which the institution is affiliated?

A. Admission of students to unaided minority educational institutions viz. schools and undergraduate colleges where the scope for merit-based selection is practically nil, cannot be regulated by the State or university concerned, expect for providing the qualifications and minimum conditions of eligibility in the interest of academic standards.

(emphasis supplied)

The right to admit students being an essential facet of the right o administer educational institutions of their choice, as contemplated under Article 30 of the Constitution, the State Government or the university may not be entitled to interfere with that right, so long as the admission to the unaided educational institutions is on a transparent basis and the merit is adequately taken care of. The right to administer, not being absolute there could be regulatory measures for ensuring educational standards and maintaining excellence thereof, and it is more so in the matter of admissions to professional institutions.

(emphasis supplied)

We are concerned with the question no.4.

Counsel for the petitioner has referred paragraph 15 of the aforesaid judgment, the same is quoted below:-

"15. Pai Foundation judgment was delivered on 31-10-2002. the Union Of India, various State Governments and the educational institutions, each understood the majority judgment in its own way. The State Governments embarked upon enacting laws and framing the regulations, governing educational ionstitutoins in consonance with their own understanding of Pai Foundation. This lead to litigation in several courts. Interim order passed therein by the High Courts came to be challenged before this Court. At the hearing, again the parties through their learned counsel tried to interpret the majority decision in Pai Foundation in different ways as it suited them. The parties agreed that there were certain anomalies and doubts, calling for clarification. The persons seeking such clarifications were unaided

professional educational institutions, but minority and non-minority. The Court formulated four questions as arising for consideration in view of the rival submissions made before the Court in Islamic Academy (SCC p. 720 para 6).

"(1) whether the educational are entitled to fix their own fee structure.

(2) whether minority and non-minority educational institutions stand on the same footing and have the same rights;

(3) Whether private unaided profession colleges are entitled to fill in their seats, toe the extent of 100% and if not, to what extent; and

(4) Whether private unaided professional colleges are entitled to admit students by evolving their own methods of admission."

Counsel for the petitioner has placed reliance on the marked portion. The question was posed to the following effect:-

"***The questions spelled out by orders of reference***

27. In the light of the two orders of reference, referred hereinabove, we propose to confine our discussion to the questions set out hereunder which, according to us, arise for decision:

(1) To what extent can the State regulate admissions made by unaided (minority or non-minority) educational institutions? Can the State enforce its policy of reservation and/or appropriate to itself any quota in admissions to such institutions?

(2) Whether unaided (minority and non-minority) educational institutions are free to devise their own admission procedure or whether the

direction made in Islamic Academy for compulsorily holding an entrance test by the State or association of institutions and to choose therefrom the students entitled to admission in such institutions, can be sustained in light of the law laid down in Pai Foundation.?

(3) Whether Islamic Academy could have issued guidelines in the matter of regulating the fee payable by the students to the education institutions?

(4) Can the admission procedure and fee structure be regulated or taken over by the Committees ordered to be constituted by Isamic Academy?"

The criteria of admission is fixed in paragraph 68 of the ***P.A. Inamdar v. State of Maharashtra*** (supra) to the following effect:-

"s. Admission

Six months prior to the commencement of the academic year, the Government would fix the percentage of students to be admitted by a minority

(religious / linguistic) professional college (other than engineering), taking into account the local needs of the State, the region as well as that of the minority community. It would be a huge and cumbersome exercise in practice, to fix a percentage for each one of the institutions separately and it would be a pragmatic approach to have a fixed percentage for all the minority institutions which is fair and reasonable. A practical approach to the problem would require a very definite percentage to be fixed for minority institutions, say, 50% so that even if candidate of their choice, belonging to the minority institutions, are only 25% they would

still have the right to select non-minority students to make up the 50%, of course, from CET held by the Government.

1. CET held by the Government would ensure that the various devices adopted by professional colleges to secretly demand capitation fees and take the same in black money, thus resulting in merit being the casualty, would not take place. No prejudice will be caused to the management of the professional colleges as they could select the minority students based on inter se merit in CET held by the Government.

3. There would equally be no disadvantage to any particular section or the Government if the same 50% rule is applied even to unaided non-minority professional colleges as well.

4. The result of following this procedure is that a consortium holding the tests for admission is done away with and a Monitoring Committee. preferably headed by a retired High Court or Supreme Court Judge would ensure fairness

and transparency both in the minority and non-minority professional institutions."

The Bench has observed with regard to the Committee:-

"144. The two Committees for monitoring admission procedure and determining fee structure in the judgment of Islamic Academy are in our view, permissible as regulatory, measures aimed at protecting the interest the students community as a whole as also the minorities themselves, in maintaining required standards of professional education on non-exploitative terms in their institutions. Legal provisions made by the State Legislatures or the scheme evolved by the Court for monitoring admission procedure and fee fixation do not violate the right of minorities under Article 30(1) or the

right of minorities and non-minorities under Article 19(1) (g). They are reasonable restrictions in the interest of minority institutions permissible under Article 30 (1) and in the interest of general public under Article 19(6) of the Constitution.

145. the suggestion made on behalf of minorities and non-minorities that the same purpose for which Committees have been set up can be achieved by post-audit or checks after the institutions have adopted their own admission procedure and fee structure, is unacceptable for the reasons shown by experience of the educational authorities of various States. Unless the admission procedure and fixation of fees is regulated and controlled at the initial stage, the evil of unfair practice of granting admission on available seats guided by the paying capacity of the candidates would be impossible to curb.

147. In our considered view, on the basis of judgment in Pai Foundation and various previous judgments of this Court which have been taken into consideration in that case,

the scheme evolved out of setting up the two Committees for regulating admissions and determining fee structure by the judgment in Islamic Academy cannot be faulted either on the ground of alleged infringement of Article 19(1)(g) in case of unaided professional educational institutions of both categories and Article 19(1)(g) read with Article 30 in case of unaided professional institutions of minorities.

148. A fortiori, we do not see any impediment to the constitution of the Committees as a stopgap or ad hoc arrangement made in exercise of the power conferred on this Court by Article 142 of the Constitution until a suitable legislation or regulation framed by the State steps in. Such

Committees cannot be equated with Unni Krishnan Committees which were supposed to be permanent in nature.

151. On Question 4, our conclusion, therefore, is that the judgment in Islamic Academy insofar as it evolves the scheme of the two Committees, one each for admission and fee structure, does not go beyond the law laid down in Pai Foundation and earlier decisions of this Court, which have been approved in that case. The challenge to setting up of the two Committees in accordance with the decision in Islamic Academy therefore, fails. However, the observation b way of clarification, contained in the latter part of para 19 of Islamic Academy which speaks of quota and fixation of percentage by the State Government is rendered redundant and must go in view of what has been already held by us in the earlier part of this judgment while dealing with Question 1."

CONCLUSION

So far as the press note is concerned, once the common entrance test has already been held and the petitioners have already been selected the press note, therefore, by affiliating a counseling is wholly without jurisdiction.

As will appear from the facts on the record that Hon'ble Chief Justice has already constituted a committee for admission and therefore, taking into consideration all the aspects of the matter, petitioners having entered into the merit test known as CET, only counseling is required in accordance with the judgment of the Apex Court in the case of T.M.A. Pai followed by P.A. Inamdar which provides the merit based admission and there should not be any deviation from the merit. The Committee shall follow the merit of the selection in accordance with the merit list.

So far as the students already admitted by the Institutions are concerned, the committee headed by Hon'ble Mr. Justice V.N. Mehrotra (Retired) has taken a decision that

as the University has not declared cut off marks and thus the students who were admitted in the institutions, if found below the cut off marks shall be permitted to continue their study. The relevant portion of the decision is quoted below:-

"माननीय महोदय,

उपर्युक्त विषय के सन्दर्भ में अवगत कराना है कि बी0एड0 पाठ्यक्रम 2005–2006 में प्रबन्धकीय कोटे की 50 सीटों पर संस्था सीतादेवी मेमोरियल इन्स्टीट्यूट आफ एजुकेप्रन एण्ड टैक्नोलौजी बी0एड0 कालिज ज्वालापुर द्वारा काफी समयपूर्व माह सितम्बर एवं अक्टूबर में अभ्यर्थियों के प्रवेप्र कर लिये गये थे। संस्था को मान्यता भी 02 सितम्बर 2005 को प्राप्त हो चुकी थी उस समय हमारे संस्थान के अलावा इन्स्टीट्यूट आफ प्रोग्रसिव स्टडीज डेवलपमैन्ट बी0एड0 कालिज रूड़की को ही मान्यता प्राप्त थी उसी समय हमें ज्ञात हुआ था कि इन्स्टीट्यूट आफ प्रोगेसिव स्टडीज डेवलपमैन्ट बी0एड0 कालिज रूड़की द्वारा दिनांक 14–11–2005 को प्रबन्धकीय कोटे की 50 सीटों पर प्रवेप्र काउन्सलिंग करवा ली गयी है और शासन द्वारा अब उनकी प्रबन्धकीय कोटे की 50 सीटों पर प्रवेप्र को स्वीकृति भी प्रदान की जा चुकी है।

अतः इसी आधार पर हमारे संस्थान द्वारा भी प्रबन्धकीय कोटे की 50 सीटों पर काउन्सलिंग करवाने हेतु दिनांक 19–10–2005 को विप्रविद्यालय को एक पत्र लिखा गया था परन्तु उस समय हमारे संस्थान की काउन्सलिंग नहीं हुई थी। अभी तक इस सम्बन्ध में कोई भी कार्यवाही नहीं की गयी है। काफी समय पूर्व जिन अभ्यर्थियों का प्रवेप्र संस्था द्वारा कर लिया गया था उनका प्रिक्षण कार्य भी अभी तक प्रारम्भ नहीं हो सकने के कारण उन अभ्यर्थियों का कालिज संचालकों के प्रति रोष बढ़ता जा रहा है। इसी सन्दर्भ में सीता देवी मैमोरियल इन्स्टीट्यूट आफ एजुकेप्रन एण्ड टैक्नोजोजी बी0एड0 कालिज ज्वालापुर द्वारा एक प्रत्यावेदन प्रार्थना पत्र माननीय मुख्यमंत्री जी एवं माननीय मुख्य सचिव महोदय उत्तरांचल शासन के समक्ष दिनांक 13–03–2006 को प्रस्तुत किया था जिस पर

आदेप्र भी जारी कर दिये गये थे परन्तु शासन द्वारा उस पर निर्णय अभी नहीं लिया गया है।

इसी सन्दर्भ में विप्रविद्यालय द्वारा भी शासन को आख्या भेजी जा चुकी है जिसमें इन्स्टीट्यूट आफ प्रोग्रेसिव स्टडीज डेवलपमैन्ट बी0एड0 कालिज रूड़की के आधार पर ही सीता देवी मैमोरियल इन्स्टीट्यूट आफ एजूकेप्रन एण्ड टैक्नोजोजी बी0एड0 कालिज ज्वालापुर की भी काउन्सलिंग कराने की अनुमति के सम्बन्ध में शासन को लिखा गया है।

माननीय महोदय उपरोक्त को स्पष्ट करते हुए यह भी अवगत कराना है कि इस सम्बन्ध में अभी तक काफी विलम्ब हो चुका है प्रिक्षण कार्य भी अभी तक प्रारम्भ न होने के कारण भी अभ्यर्थियों द्वारा संस्था के प्रबन्धकों को काफी परेप्रान किया जा रहा है प्रिक्षण कार्य प्रारम्भ न होने के कारण अभ्यर्थी भी काफी परेप्रान है।

अतः अभ्यर्थियों की परेप्रानी को देखते हुए अभ्यर्थियों के हित में प्रार्थना है कि सीता देवी मैमोरियल इन्सटीट्यूट आफ एजुकेप्रन एण्ड टैक्नोलोजी बी0एड0 कालिज ज्वालापुर की बी0एउ प्रवेप्र काउन्सलिंग इन्सटीट्यूट आफ प्रोग्रेसिव स्टीडीज डेवलपमैन्ट बी0एड0 कालिज रूड़की के आधार पर जल्दी ही करवाने की कृपा करें जिससे अभ्यर्थियों के हित में जल्दी ही प्रिक्षण कार्य प्रारम्भ कराया जा सके।"

I find that such decision taken by the Committee in special circumstances in the interest of the students at large and I also hold accordingly.

So far as the counseling is concerned, petitioners have claimed that they were selected in the common entrance test. However, from time to time, the criteria for counseling on the basis of merit by the Committee has already been approved in accordance with paragraph 68 of the judgment in ***T.M.A. Pai Foundation Vs. State of Karnataka*** (supra) in ***Islamic Academy Education Vs. State of Karnataka*** (supra) and ***P.A. Inamdar (supra)***, I do not find any reason to deviate from the same and as such a writ of mandamus is issued directing the Committee constituted by Hon'ble the Chief, State of Uttaranchal headed by Hon'ble Mr. Justice V.N.

Mehrotra to proceed with the counseling so that the students may not be deprived of the study of the current session in accordance with the merit.

The majority opinion in Islamic Academy of Education vs. State of Karnataka (2003) 6 SCC 697 has held as under:

> *(1) In professional institutions, as they are unaided, there will be full autonomy in their administration, but the principle of merit cannot be sacrificed, as excellence in professions is in the national interest.*
>
> *(2) Without interfering with the autonomy of unaided institutions, the object of merit based admissions can be secured by insisting on it as a condition to the grant of recognition and subject to the recognition of merit, the management can be given certain discretion in admitting students.*
>
> *(3) The management can have quota for admitting students as its discretion but subject to satisfying the test of merit-based admission, which can be achieved by allowing the management to pick up students of their own choice from out of those who have passed the common entrance test conducted by a centralized mechanism. Such common entrance test can be conducted by the State or by an association of similarly placed institutions in the State.*

Relying upon the judgment of ***T.M.A. Pai Foundation Vs. State of Karnataka (2002) 8 SCC 481*** in ***P.A. Inamdar Vs. State of Maharashtra (2005) 6 SCC 537***, it has been held a under:-

"109. And yet, before we do so, let us quote and reproduce paras 68, 69 and 70 from Pai Foundation to enable easy reference thereto as the core of controversy touching the four questions which we are dealing with seems to have originated therefrom. These paragraphs read as under:(SCC pp. 549-50)

"68.[(I)] I would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forego or discard the principle of merit. It would, therefore, be permissible for the university or the Government , at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods.

[(II)] For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/university and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counseling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the Government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges. The same principles may be applied to other non-professional but unaided educational institutions viz. graduation and postgraduation non-professional colleges or institutes.

In view of the principle of law laid down above following directions are issued:-

(1) a writ of certiorari is issued quashing the press note dated 30th September, 2005, annexure-9 to the writ petition.

(2) a writ of mandamus is issued directing the Committee constituted by Hon'ble the Chief Justice of Uttaranchal headed by the Hon'ble Mr. Justice V.N. Mehrotra to proceed with the counseling of 50% seats of management quota according to the discretion of the Management subject to the recognition of merit amongst the selected students of Common Entrance Test known as C.E.T., having admitted from single window in accordance with Islamic Academy Education Vs. State of Karnataka (2003) 6 SCC 697 as quoted above.

(3) A writ of mandamus is issued directing the State Government to frame the rules as per direction issued by the Apex Court in T.M.A. Pai case (2002) 8 SCC 481, at the earliest.

(4) A writ of mandamus is issued directing the Committee headed by Hon'ble Mr. Justice V.N. Mehrotra (retired) to function till a statutory body does not come into existence.

On 12th June, 2006, following order was substituted by the Division Bench:-

"10. In this view of the matter, the impugned order dated 06.05.2006 is substituted by the following order:

"The petitioners shall be provisionally permitted to appear in the counseling. The entire exercise for their admission shall be strictly in accordance with the dicta of Apex Court in the case of Islamic Academy of Education and another Vs. State of Karnataka and others reported in (2003)

6 SCC 697, P.A. Inamadar and others Vs. State of Maharashtra and others reported in (2005) 6 SCC 537 and State of Maharashtra Vs. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya and others reported in 2006 AIR SCW 2048. The admission of the petitioners, if any, shall be subject o the final decision of the writ petition.

The directions given above shall continue and are absolute and the petitioners shall continue their studies subject to the observations made above in the body of the judgment.

In view of the above, the candidates, who appeared in the counselling and were given admission provisionally pursuant to interim order dated 06.05.2006, which was substituted in Special Appeal No. 22/2006 order-dated 12.06.2006, shall continue.

Accordingly, writ petition is allowed. No order as to costs.

Let a copy of this judgment be sent to the Chief Secretary, Government of Uttaranchal and Secretary to the Ministry of Human Resources and Development, Union of India for compliance.

(Rajesh Tandon, J.)

10.08.2006
Rathour